In the

Supreme Court of the United States

October Term, 1938.

No. 37.

ANNA MARIE MAYER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING, TOGETHER WITH CERTIFICATE AND COPY OPINION OF THIS COURT.

LOUIS MARSHALL,
MAX J. KOHLER,
ARTHUR V. MOORE,
Of Counsel for Petitioner.

The Knight Press, 20 Vesey St., N. Y. Tel. Barclay 7-8560

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IN THE

Supreme Court of the United States

ANNA MARIE MANEY, Petitioner, vs. UNITED STATES OF AMERICA.	No. 27. October Term, 1928.

PETITION FOR REHEARING.

To the Supreme Court of the United States:

Petitioner respectfully prays this Honorable Court for a rehearing of this cause, or for other appropriate relief, and shows:

FIRST.

This Court, on October 22, 1928, in an opinion by Mr. Justice Holmes (copy of which is hereto annexed as an Appendix), decided this cause, which had been argued this term, and affirmed the decision of the United States Circuit Court of Appeals for the Seventh Circuit (Judge Page writing, Judge Alschuler dissenting, reported in 21 F. [2nd] 28), and reversing the decision of the United States District Court for the Eastern District of Wisconsin (Judge Geiger writing, reported in 13 F. [2nd] 662). Certiorari had been ordered to issue by this Court January 9, 1928.

SECOND.

By inadvertence of counsel, important decisions, statutes, and rules, and incidents in the legislative history of the Naturalization Law of 1906 involved, were not called to the attention of the Court. The unexpectedly rapid progress made by this Court in its calendar compelled counsel hurriedly to prepare and file petitioner's brief in May last. Counsel had contemplated filing a reply brief, but the Government's brief was served only a few days before the oral argument herein, and time to prepare such a brief was wholly inadequate.

THIRD.

The opinion of this Court lays much stress on the clause in the beginning of Section 4 of the Naturalization Act of June 29, 1906, involved, which reads: "That an alien may be admitted to become a citizen of the United States in the following manner *and not otherwise*," as indicating that the filing of the Certificate of Arrival with the petition was regarded as mandatory and not directory. It was, however, overlooked that the legislative history of our Naturalization Laws, especially in the light of the facts collated in *U. S. v. Viaropulos*, 221 Fed. 485 at 488-489, shows conclusively that these words were first inserted in the Naturalization Act of 1795 for the sole purpose of superseding State Naturalization Laws, in the exercise of the constitutional authority conferred on Congress "to establish a uniform rule of naturalization." They do not relate to the details of procedure in the courts in respect to the exercise of their power to naturalize.

The words "*and not otherwise*" were embodied in the Act of 1795 at a time when various States of the Union were naturalizing aliens on entirely different terms from

those specified in the earlier Federal act, for the express and avowed purpose of superseding such inconsistent State enactments. This is pointed out by the editor of the "Federal Statutes Annotated Series" (Vol. VI, pp. 956-957), and those words have been carried along in every naturalization act since 1795. Under the familiar principle that words in a statutory revision are to be construed in the sense in which they were used in the original act (36 *Cyc.* 1067-1068; *United States* v. *Cerecido*, 209 U. S. 337; *Heald* v. *District of Columbia*, 254 U. S. 20, 22), they have no different significance in the Act of 1906 here involved, or in the intermediate naturalization laws, although so far as discerned, this point had not been called to this Court's attention prior to the present case. This accounts for some rather sweeping language in *United States* v. *Ness*, 245 U. S. 319, a case which was doubtless correctly decided on the facts involved in it.

We venture to quote at length from the able opinion of Judge Orr in the *Viaropulos* case, *supra:*

> *"The provisions, at the beginning of section 4, that an alien may be admitted to become a citizen of the United States 'in the following manner and not otherwise,'* has given rise to some differences of opinion. It has created a tendency on the part of the representatives of the Bureau of Naturalization to criticize every variation, oftentimes the very slightest, from the exact language of the act. *Practically the same language appeared in the second Naturalization Act, passed by Congress on the 29th of January, 1795.* See 1 Stat. at Large, 414. That act was entitled:
>
> 'An act to establish an uniform rule of naturalization, and to repeal the act heretofore passed on that subject.'
>
> The following quotation therefrom is sufficient:
>
> 'For carrying into complete effect, the power given by the Constitution, to establish an uniform rule of naturalization throughout the United States:

> Section 1. * * * any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, *on the following conditions, and not otherwise.*'

The prior act, which was that of March 26, 1790 (1 Stat. at Large 103), did not contain the words last above quoted. *In the meantime many of the states*, notwithstanding the constitutional provision that Congress should have power 'to establish an uniform rule of naturalization,' *had been exercising a supposed right of admitting aliens to citizenship in the respective states.* At April term, 1792, in the United States Circuit Court for the Pennsylvania District, in the case of *Collet* v. *Collet*, 2 Dall. 294, 1 L. Ed. 387, Fed. Cas. No. 3,001, the court say:

> 'The question now agitated depends upon another question: Whether the state of Pennsylvania since the 26th of March, 1790 (when the act of Congress was passed), has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the Constitution of the United States, the authority to naturalize is exclusive or concurrent? * * * We are of opinion, then, that the states, individually, still enjoy a concurrent authority upon this subject, but that their individual authority cannot be exercised so as to contravene the rule established by the authority of the Union.'

The Court further say:

> 'The true reason for investing Congress with the power of naturalization has been assigned at the bar. It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual states cannot exclude those citizens who have been adopted by the United States, but they can adopt citizens upon easier terms than those which Congress may deem it expedient to impose.'

That decision, intervening as it did between the acts of 1790 and 1795, *seems to have required that the language in the act of 1795 should indicate an*

> *exclusive method of naturalizing foreigners.* Since Chirac v. Chirac, 2 Wheat. 260, 269 (4 L. Ed. 234), where Chief Justice Marshall uses this language, 'That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted,' the meaning of the constitutional provision never seems to have been seriously doubted. *That every variation from the exact language of the act should have the effect of rendering illegal the action of the court would be a strained construction, especially in view of section 27, which sets forth forms to be used in the proceedings to which they relate. That section does not say: The following forms shall be used* in the proceedings to which they relate, *but it says 'substantially'* the *following forms shall be used* in the proceedings to which they relate."

Without enumerating all the States which had inconsistent acts of their own in force in 1795, under which naturalization proceedings were conducted, it will suffice to point out that Pennsylvania courts were continually naturalizing foreigners after only one year's residence pursuant to her own act of March 17, 1789, Section 3 (13 Pennsylvania Stats. at Large, 1787-1790, p. 222), while New York, for instance, naturalized aliens unconditionally by special legislative act (see Laws of State of New York, 1789-1796, Vol. III, p. 83). *The legislative intention by the use of the words "and not otherwise" to strike down these State laws, despite vigorous State rights opposition, was unmistakably shown by the Congressional debates of 1794-1795, reported in "Annals of Congress"* (Vol. III, 1793-1795, pp. 811-816, 1004, 1021, 1042-1050, 1060-1065), which are ably summarized in *Prof. F. G. Franklin's "Legislative History of Naturalization in the United States"* (pp. 66-68), as follows:

> "The bill passed rapidly through the Senate. There was debate on a motion to insert in the first section 'That no alien shall hereafter become a citizen of the United States, or any one of them, *except in the manner prescribed by this act.*' (This motion was withdrawn for amendment the following day, after the failure of an effort to commit the bill and

the amendment.) It was agreed however to insert the words 'any of' after 'citizen of' in the clause that as amended reads: 'That any alien being a free white person, may be admitted to become a citizen of any of the United States on the following conditions' *and then by a vote of 13 to 11, 'and not otherwise' was added.* • • • The power vested in congress to establish a uniform rule of naturalization was the power of making state citizens from aliens. *By the final phrase, the assertion is made that this power is an exclusive one.*"

FOURTH.

By inadvertence of petitioner's counsel, the Court overlooked an opinion rendered by Mr. Chief Justice Marshall in 1830 in *Spratt* v. *Spratt*, 4 Peters 393, construing an almost identical "Certificate of Arrival" provision in an earlier Naturalization Act as directory only, and not mandatory, and providing for a liberal construction of Naturalization Acts.

In the case in question the validity of the naturalization of one Spratt was involved. He arrived in this country in 1812, but did not have himself enrolled as a resident alien under the Act of 1802 until April 17, 1817; he was naturalized on October 11, 1821, but his certificate of naturalization did not comply with Section 6 of the Act of 1816, which had been enacted before his naturalization, but was held inapplicable to him because he had arrived before June 18, 1802. *It is significant that the opinion specifically quoted* (p. 405) *from the Act of 1802 the words "on the following conditions and not otherwise," but gave them no such weight.* Two questions here relevant were considered: (1) *the requirement of a liberal construction of a Naturalization Law, in favor of the prospective citizen,* and (2) *the directory character of a provision for filing a certificate of landing, despite the words "and not otherwise."* Said the Chief Justice:

> "1. The first question depends on the Act of 1802 for establishing an uniform rule of naturali-

zation. The act declares that an alien may be admitted to become a citizen of these United States *'on the following conditions, and not otherwise.'* The act then prescribed four conditions, the three first of which were applicable to James Spratt, and were literally observed.

The 2d section enacts 'that in addition to the directions aforesaid, *all free white persons being aliens, who may arrive in the United States after the passing of this act*, shall, in order to become citizens of the United States, *make registry and obtain certificates in the following manner*, to wit: every person desirous of being naturalized, shall, if of the age of twenty-one years, *make report of himself*, &c.' The law then directs what the contents of the report shall be; orders it to be recorded, and that a certificate thereof shall be granted to the person making the report: *'which certificate shall be exhibited to the court by every alien who may arrive in the United States after the passing of this act, on his application to be naturalized, as evidence of the time of his arrival within the United States.*

As James Spratt arrived within the United States after the passage of the Act of 1802, he is embraced by the second section of that act, and was under the necessity of reporting himself to the clerk, as that section requires. *Must this report be made five years before he can be admitted as a citizen?*

The law does not in terms require it. The third condition of the first section provides 'that the court admitting such aliens shall be satisfied that he has resided within the United States five years at least,' *but does not prescribe the testimony which shall be satisfactory.* This section was in force when James Spratt was admitted to become a citizen, and was applicable to his case. But the second section requires, in addition, that he shall report himself in the manner prescribed by that section; and *requires that such report shall be exhibited, 'on his application to be naturalized, as evidence of the time of his arrival within the United States.' The law does not say that this report shall be the sole evidence*, nor does it require that the alien shall report himself within any limited time after his arrival. Five years may intervene between his arrival and report, and yet the report will be valid.

The report is undoubtedly conclusive evidence of the arrival, and must be so received by the court; but if the law intended to make it the only admissible evidence, and to exclude the proof which had been held sufficient, that intention ought to have been expressed." Yet the inference is very strong from the language of the act, that the time of the arrival must be proved by this report; and that a court, about to admit an alien to the rights of citizenship, ought to require its production.

But is it anything more than evidence which ought, indeed, to be required to satisfy the judgment of the court, but the want of which cannot annul that judgment? The judgment has been rendered in a form which is unexceptionable. Can we look behind it, and inquire on what testimony it was pronounced?

The act does not require that the report shall be mentioned in the judgment of the court, or shall form a part of the certificate of citizenship. The judgment and certificate are valid, though they do not allude to it. This furnishes reason for the opinion that *the act directed this report as evidence for the court; but did not mean that the act of admitting the alien to become a citizen should be subject to revision at all times afterwards, and to be declared a nullity, if the report of arrival should not have been made for years previous to such admission.*"

Taking up next the question relating to the Act of 1816 and its general conclusion, the Court said:

"The act of 1816, sec. 6, has, we think, considerable influence on this question. That act requires that the *certificates of report and registry required* as evidence of the time of arrival in the United States and of the declaration of intention to become a citizen, 'shall be exhibited by every alien, on his application to be admitted a citizen of the United States, who shall have arrived within the limits and under the jurisdiction of the United States since the 18th day of June, 1812; *and shall each be recited at full length in the record of the court admitting such an alien; and any pretended admission of an alien*, who shall have arrived within the limits and

under the jurisdiction of the United States since the said 18th day of June, 1812, to be a citizen, and after the promulgation of this act, *without such recital of such certificate at full length, shall be of no validity.*'

James Spratt arrived within the United States previous to the 18th day of June, 1812, and is, consequently, not within the provisions of the Act of 1816.

This act is not intended to explain the Act of 1802, but to add to its provisions. It prescribes that which the previous law did not require; and prescribes it for those aliens only who arrive within the United States after the 18th day of June, 1812. It annuls the certificates of citizenship which may be granted to such aliens, without the requisite recitals; consequently, without this act, such certificates would have been valid. The law did not require the insertion of these recitals in the certificate of James Spratt.

The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. *It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity.*

The inconvenience which might arise from this principle, has been pressed upon the court. *But the inconvenience might be still greater if the opposite opinion be established. It might be productive of great mischief, if after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court not apparent on the record of his admission.* We are all of opinion that James Spratt became a citizen of the United States on the 11th of October, 1821."

FIFTH.

United States v. _Ness_ (245 U. S. 319), though correctly decided, does not require affirmance of the decision below herein, but some of the references to the Certificate of Arrival contained in the opinion, believed to be based upon a failure to note the purpose of the words "and not otherwise," have given rise to conflicting views in the court below, which, moreover, overlooked the fact that petitioner's predicament is due to mistakes occasioned by the acts or omissions of Government officials.

In *United States* v. *Ness*, the alien not only did not produce the certificate of arrival during the pendency of the proceedings, but concededly could not do so, nor could he supply secondary evidence of its contents to establish that he had been legally admitted, for, concedesly his entry without the statutory inspection by the immigration authorities requisite (p. 321), was absolutely illegal. Instead of being naturalizable, he was deportable under the Immigration Laws for an illegal entry (Act of 1917, Secs. 12, 15-16, 18-19); Congress certainly did not intend to make such illegal entry, the beginning of the requisite five years' "residence" under the Naturalization Laws, as was pointed out by Judge Neterer in *In re Kempson*, 14 Fed. (2nd) 668 at 669.

Section 4, Second, subdivision 4 of the Act of 1906 (which has become Sec. 380 of Title 8 of the United States Code), reads:

> "*At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor*, if the petitioner arrives in the United States after the passage of this act, *stating the date, place and manner of his arrival in the United states, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.*"

It will be observed that *this is impersonal*, with respect to the designation of the person who is to file the two documents referred to, and who is to attach them. *It cannot refer to the petitioner himself, as concerns the declaration of intention referred to, at least, because that must have been on file previously for not less than two nor more than seven years* after its execution (Sec. 4, Second), and must before that time have been bound in the clerk's docket (Sec. 14). Under the Secretary of Labor's Regulations Rule 4, subdivision B* (referred to in the opinion of this Court, and authorized to be promulgated in Sec. 28 of the Act), this declaration must be executed in triplicate, the original remaining on file. This is the copy required to be filed with the petition years later. *Neglect to attach these documents is therefore the fault of the clerk, not of petitioner.* Rule 5, subdivision B, paragraph 1, provides that *the Clerk shall not accept or file* the petition for naturalization, *unless the "Certificate of Arrival" is attached, again showing that it was the clerk's fault, and not the petitioner's, that the petition here involved was filed without the arrival certificate. What may have happened in the instant case, as in In re Pick*, 209 Fed. 999, *is that the certificate was produced by petitioner when the petition was tendered to the clerk, but was lost by him before it was attached (for all presumptions are that otherwise the clerk would not have received the petition), and that petitioner's statement in her petition on the official form* set forth in Section 27 was true, that "*attached hereto and made a part of this petition are my declaration of intention to become a citizen and the certificate from the Department of Labor required by law*" so far as she could control the subject.

* References are made herein to the edition of the Regulations promulgated in June, 1924, although the naturalization decree herein was made in February of that year. In that respect we follow the Government's brief, which quotes one passage from the earlier edition of 1920, and many from the next edition, issued in 1924. This course is not unjustified, because nearly all the provisions in the 1924 edition were promulgated as separate amendments to the 1920 edition, from time to time, before the hearing of petitioner's application for naturalization herein.

That accounts for the fact set forth in the District Court's opinion (Record, p. 7), that "twenty days thereafter * * * (after filing of the petition) such certificate was mailed to the Clerk by the District Director of Naturalization—acting I assume for the Department of Labor, and it would seem, on behalf of, or at least in the interest of, the petitioner." Far from treating such belated filing as jurisdictional, it doubtless took place under Rule 5, subdivision B, paragraph 3—not heretofore called to this Court's attention—reading:

> "*District directors of naturalization* and [sic] assistant naturalization examiners may, at the expense of the alien candidate for citizenship *telegraph to the proper authorities* for information, concerning the time, place and manner of such alien's arrival in the United States, *and may upon advices in response to such telegram, issue or direct the issuance of a certificate of arrival to such alien in accordance therewith.*"

Instead of following this authorization directly, the District Director erroneously waited till it reached him from Washington by mail, meantime arranging for the filing of the petition forthwith. Nevertheless his successor took this technical objection on the hearing.

As said by Judge Neterer in *In re Kempson*, 14 Fed (2nd) 668, *supra*, in a naturalization case:

> "*Applicants, however, are not responsible for defaults of officials in making proper registration, when they reported for inspection.* * * * *He should not now be made to suffer for this official irregularity.* * * * Pincus, having reported for inspection, was examined and passed but no record at the time was made. *A nunc pro tunc certificate is proper in his case because it supplies a record which should have been made at the time.*"

See accordingly:

> *Matter of Christen*, 43 N. Y. Super. 523, 527-529 (1878).

It will furthermore be observed that the Certificate of Arrival is based on the record required to be made "in books of record" by Section 1 of this same Act, concerning

> "each alien arriving in the United States from and after the passage of this act" (stating) "the date of arrival of said alien, and if entered through a port, the name of the vessel in which he comes. * * * And it shall be the duty of said commissioner of immigration to cause to be granted to such alien, a certificate of such registry, with the particulars thereof."

This merely requires the transcribing into such dockets of the information contained in the ship's manifests kept in accordance with the practice in vogue for many decades as to each arriving immigrant under the Immigration Laws, and embodied in the Immigration Act of 1917 as Sections 12 and 13 (see *McInerny* v. *United States*, 143 Fed. 729 at 736-738). *The fact is important for consideration to meet the mistaken suggestion of this Court that there is nothing of public record, by which to amend the omission of a certificate of arrival from the naturalization petition*, nor is it denied that the belated certificate in the instant case was procured from such public immigration records by the Immigration Bureau.

The Naturalization Law requires the petition to set forth all the facts contained in the "Certificate of Arrival" (Sec. 4, subd. Second, and form petition in Sec. 27), and all the facts to be set forth in the "Certificate of Arrival" were set forth in the petition herein, for use in governmental or other "checking up," the "Certificate of Arrival" being *employed as governmental contemporary confirmation of such arrival and authorized admission*. The Act of 1906, however, required the preparation of such docket abstracts of entry (Sec. 1) and the production of "Certificate of Arrival" only of persons who arrived *after* its passage, because it appeared in the debate on the bill that many of the basic ship's manifests had been lost or accidently destroyed by fire (*Congressional Record*, Vol. 40, Pt. 8, p. 7764). As will be presently shown, some

have since been destroyed also, before they were carried over into the dockets provided for in Section 1, *so that this case indirectly involves the very important question, affecting thousands of applicants for citizenship, whether naturalization must be perpetually denied to them on the assumption that secondary evidence of arrival may not be adduced to satisfy the Immigration Bureau of legal entry, as in the case of all other destroyed records*, or whether the decision in *United States* v. *Ness* is to be construed *as literally making production of such certificates taken from the ship's manifest, jurisdictional* (see *Hogan* v. *Kurtz*, 94 U. S. 773; *United States* v. *Price*, 113 Fed. 851; *Strickly* v. *Hill*, 22 Utah, 257, 268-270; *People* v. *McNally*, 59 How. Pr. [N. Y.] 500; *Gagnon* v. *United States*, 38 Ct. Cls. 10, aff'd 193 U. S. 451; *Am. Land Co.* v. *Zeiss*, 219 U. S. 47; *Am. & Eng. Anno. Cases*, 1916D, 248-258; *United States* v. *Jung Ah Lung*, 124 U. S. 621, at 633-635; *In re Page*, 206 Fed. 1004; *In re McPhee*, 209 Fed. 143; *In re Peck*, 209 Fed. 999). For a considerable time the Immigration Bureau issued *nunc pro tunc certificates under such circumstances*, but suddenly stopped on the supposed holding in *United States* v. *Ness*. The Government's own files establish a basis for secondary evidence in such cases, by showing the loss or destruction of the manifests of ships whose arrival is attested by its own contemporary customs and quarantine records. The Commissioner of Naturalization himself, in his annual report of July 1, 1925 (p. 16), wrote:

> "The Supreme Court of the United States has held, in the case of those coming to this country after June 29, 1906, that it is a mandatory requirement that the certificate of arrival be filed as a part of the petition. *There are large numbers of cases where, for some reason for which the alien is not responsible, there is no record of the date, place and manner of his arrival before June 3, 1921* (the date of the beginning of the quota restrictions). *In these cases it would seem to be unjust to deny the alien who had not evaded the law and who is not responsible for the lack of record, a certificate of arrival, and thereby prevent him from having his eligibility for naturalization determined.*"

Though everyone listed on a ship's manifest after the Law of 1906 was enacted is, of course, entitled to be registered and to secure a Certificate of Arrival under Section 1 of that Act, that section says nothing about ship's manifests, and is not thus limited; but latterly the immigration authorities have unlawfully declined to register (and to grant Certificates of Arrival) to persons who entered lawfully, but are not listed on extant manifests, because the latter have been lost or destroyed, thus preventing their naturalization.

In the light of these facts, it will be observed that *United States* v. *Ness* involved one who could not produce a "Certificate of Arrival" (or secondary official evidence of legal arrival) because he had entered unlawfully, and his legal "residence" in the United States had not yet begun (see *In re Kempson*, 14 Fed. [2nd] 668, *supra*, and *Kaplan* v. *Tod*, 267 U. S. 228, the latter holding that a minor imbecile child of a citizen has not begun to "dwell in the United States," when she was temporarily committed to the custody of a charitable society, pending deportation). Nay, more, conceding that Congress intended to require proof of lawful entry by official government records, as a condition for naturalization (subject to the usual rule allowing secondary evidence of destroyed records), there is no evidence of *lawful* entry whatever in the allegations of the petition, and none to justify a decree admitting petition to naturalization, *unless*, before decree, official proof of legal entry is furnished, and this fact was doubtless also in the mind of this Court in emphasizing, as it did in the opinion in *United States* v. *Ness*, the necessity of producing an official certificate of entry. *That is, however, an entirely different proposition from that here involved,—and in no way under consideration in the Ness case,—of the power of the Court to make good, before decree rendered, an omission, obviously of the Government officers themselves. Every item calling for checking up is set forth in the petition itself, and mere delay in filing the certificate can work no possible harm.*

This Court, speaking by Mr. Justice Brandeis, properly answered the question now under consideration in *United*

States v. *Ness* in the affirmative, "whether filing the certificate of arrival as provided in Sec. 4, subdivision second, is an essential prerequisite to a valid order of naturalization, and that it is not merely a form of proof which the naturalization court has power to dispense with for cause" (p. 322).

The Government's own records and the naturalization petition in the present case embrace all the facts (and additional details besides) contained in the Certificate of Arrival, which this Court (p. 323) describes as "the natural starting point for (this) investigation" (p. 323). The Court apparently overlooked the fact that the allegations required to be made in the petition enable the Government at once to compare them with the ship's manifests, without any need *meantime* for an immigration bureau "Certificate to state the date, place and manner of arrival" (Sec. 4). In *United States* v. *Ness*, no such verification was possible, because the alien, having by his own wrongful act entered illegally, could not show that he had ever entered lawfully. On page 324, the Court quoted the phrase of Section 4, to wit, "*in the following manner and not otherwise*," overlooking the fact that this language was merely intended to supersede State naturalization laws, and the construction thereof in *United States* v. *Vasquez*, 221 Fed. 485, *supra*, and of this Court in *Spratt* v. *Spratt*, 4 Peters 393, by Chief Justice Marshall to the contrary.

Undoubtedly the conclusion expressed at page 324 is correct, that "the value of contemporary documentary evidence was recognized, and the certificate of arrival was therefore specifically included among the prerequisites to naturalization." The intention of Congress governs, and not merely the letter of the law (*Church of the Holy Trinity* v. *United States*, 143 U. S. 457). "The letter killeth, but the spirit giveth life."

In the present case in the Court below (Record, p. 25), Judge Page, after quoting from the opinion of this Court in *United States* v. *Ginsberg*, 243 U. S. 472, *and specially*

emphasizing the words from the statute "and not otherwise," said:

> "This language seems to say that the *form and contents of the alien's sworn petition to the court and the manner of its preparation, filing and presentation shall be in exact accordance* with the provisions of the act, *and not otherwise*, before there is any *power* in the court to act upon it."

So also, in quoting and applying the language of the leading case of *French v. Edwards*, 13 Wall. 506, 511, distinguishing between "directory" and "mandatory" provisions, the lower Court (Record, pp. 24-25) said, with particular reference to the words *"and not otherwise"*:

> "And it seems to follow necessarily from what is said by the court, that *even provisions which are usually considered directory become mandatory if 'accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.'"*

It is obvious that this decision rests almost wholly on the misapprehension referred to as to the meaning of the words "and not otherwise."

The decision in *United States v. Ginsberg*, *supra*, is sound beyond question, for Congress had expressly required that naturalization must be had in open court, as distinguished from chambers. *This provision related directly to the Court's jurisdiction*, and was intended to make the procedure public, solemn and judicial. There, also, however, the real meaning of the words "and not otherwise" were not called to the Court's attention, and although it referred to that phrase, it acted on the *controlling Section 9*, requiring proceedings to be "in open court." The case is well distinguished, however, in a unanimous opinion by the United States Circuit Court of Appeals for the Third Circuit in *United States v. Richmond*, 17 Fed. (2nd) 28, where the Judge who granted naturalization left the court room during part of the naturalization proceedings, which were conducted in open court, and held another session in another part of the

court house while the petitioner and his witnesses were examined before the clerk; the naturalization decree was held to be nevertheless valid as against collateral attack.

The mere omission to file the "certificate of arrival" with the petition, where it was supplied before the decree was granted, has been held not to vitiate the decree in the following cases:

In re Pick, 209 Fed. 999;
In re Titone, 233 Fed. 175;

and similar procedural errors have been similarly treated in

United States v. *Richmond*, *supra* (3rd Cir.);
United States v. *Skvednick*, 19 Fed. (2nd) 71 (C. C. A., 3rd Cir.);
United States v. *Milder*, 284 Fed. 571, at 572 (C. C. A., 8th Cir.);
United States v. *Pandit*, 15 Fed. (2nd) 285 (C. C. A., 9th Cir.); certiorari refused, 273 U. S. 759;
United States v. *Salomon*, 231 Fed. 928 (C. C. A., 5th Cir.); aff'd 231 Fed. 461;
United States v. *Lenore*, 207 Fed. 865;
United States v. *Erickson*, 188 Fed. 747;
United States v. *Ness*, 230 Fed. 950 (C. C. A., 8th Cir.); aff'd 217 Fed. 169; reversed 245 U. S. 319;
United States v. *Stoller*, 180 Fed. 910, 912.

SIXTH.

The provision for filing the Certificate of Arrival with the petition is directory only, not mandatory, as appears from consideration of other provisions of this Act, from related legislation, and from the legislative history of this Act of 1906, and such legislative intention should be given effect.

(a) *It will be observed that this same Act of 1906, while prescribing forms for use, says in Section 27 that "substantially the following forms shall be used,"* which is properly emphasized by Judge Orr in *United States* v. *Viscopalos*, 221 Fed., at page 489, *supra*, as showing that a holding that

> "every variation from the exact language of the act should have the effect of rendering illegal the act of the court, would be a strained construction."

Cf. Spratt v. *Spratt*, *supra*.

(b) *Moreover, the Naturalization Act provides for judicial proceedings (Spratt* v. *Spratt*, 4 Peters 393; *Tutun* v. *United States*, 270 U. S. 568), *and the Act should be read in conjunction with other statutes establishing procedure, including Section 954 of the United States Revised Statutes* (now Title 28, Sec. 777—see annotations, U. S. Code Anno., pp. 6692) *and Equity Rule 19* (see U. S. Code Anno., Title 28, Sec. 723, Notes Nos. 601-640), *authorizing liberal amendment of judicial pleadings and procedure in furtherance of justice* (*Norton* v. *Larney*, 266 U. S. 511, 515-517; *In re Wight*, 134 U. S. 135, at 146; *Am. & Eng. Anno. Cases*, 1915D, 526-649; *Underwood Cont. Corp.* v. *Davies*, 287 Fed. 776 [C. C. A.]).

Naturalization has been likened by this Court (*Tutun* v. *United States*, 270 U. S., at 578) to a grant of public land, and to a patent for an invention, and in those cases the right to amend is in no way curtailed (32 *Cyc.* 1007-1008, 1039; 30 *Cyc.* 891-892), nor in suits against the

United States which are purely statutory (*Great Falls Co. v. United States*, 16 Ct. Cls. 160, at 188-189 [aff'd 112 U. S. 645]). See, accordingly, *Spratt v. Spratt*, 4 Peters 393, *supra*.

In fact, naturalization proceedings have always been amended with great liberality throughout history, until the naturalization examiners appointed under the Act of 1906 began erroneously to engage in an effort to treat every deviation from the letter as jurisdictional, as pointed out by Judge Orr, supra, in the Viaropulos case, supra.

Matter of Wolton, 125 N. Y. Misc. Rep. 564
2 *Corpus Juris*, 1124 (Aliens, Amendment of Naturalization Record), citing
United States v. Stoller, 180 Fed. 910
State v. Macdonald, 24 Minn. 48, 58
Matter of Christern, 43 N. Y. Supp. 523, 527-529
Priest v. Cummings, 16 Wend. 617, at 625, Nelson, J. (reversed on other point, 20 Wend. 338).

See also:

United States v. Ericson, 188 Fed. 747, 748
In re Denny, 240 Fed. 845, Hand, J.
In re Pollock, 257 Fed. 350, 352, Mayer, J.
Matter of Hennig, 248 Fed. 990
McCarthy v. Marsh, 5 N. Y. 263, 284
Green v. Salas, 31 Fed. 106, 111, Speer, J.
Matter of Kevosian, 127 N. Y. Misc. Rep. 167
Matter of Kacusick, 208 N. Y. App. Div. 844
Matter of Vigo, 32 N. Y. Misc. Rep. 392

So long as there is anything existent by which to amend, even after the expiration of the term, amendment takes place freely.

Gagnon v. United States, 193 U. S. 451, aff'g 38 Ct. Cls. 10.

As is correctly said in *Corpus Juris, supra:*

> *"The record of naturalization may be amended as in other cases nunc pro tunc to make the record conform to the truth."*

The best and fullest discussion of the right to amend in naturalization proceedings seems to be contained in *Matter of Wolton*, 125 N. Y. Misc. Rep. 564, *supra*, where many of the prior authorities are reviewed, and it is well pointed out there that this Court recognized the right in *Gagnon v. United States*, 193 U. S. 451, at 456, though it properly held that the naturalization court there involved had no power *nunc pro tunc* to enter a decree of naturalization thirty three years after an alleged original order for a decree, merely on applicant's affidavit that such order had been made, without any contemporary paper, memorandum, or entry of any kind or authenticated or certified copy thereof being produced, tending to establish the fact by which to amend. As is pointed out in *Matter of Wolton, supra*, this Court recognized in the *Gagnon* case that the general rule was applicable to naturalization proceedings, that

> "The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice."

(The opinion below in that case [38 Ct. Cls. 10] ably collates the authorities for the proposition.) Compare also the language of Learned Hand, J., in *In re Denny, supra*, of the Court in *United States v. Stoller, supra*, and the dissenting opinion of Alschuler, J., in the instant case. Until after 1906, at least, practically the universal rule regarding naturalization proceedings is that laid down (following *Spratt v. Spratt, supra*) in *McCarthy v. Marsh*, 5 N. Y. 263, at 284, where the Court said:

> *"All courts look with favor on proceedings to admit aliens to citizenship, and it is just that they should;* for the want of acquaintance with our laws and judicial proceedings, the unsettledness of their

> residences in general for some years, and the consequent liability to lose their documents and papers, should shield them from technical and sharp objections to their naturalization papers whenever there appears to have been an honest intention to become a citizen, and comply with the laws of our country."

The language of this Court as to the law favoring claims to citizenship is similar, for, quoting with approval from a Congressional Report in the leading case of *Boyd* v. *Thayer*, 143 U. S. 135, at 169, it said:

> "No principle has been more repeatedly announced by the judicial tribunals of the country, and more constantly acted upon, than that the leaning in questions of citizenship, should always be in favor of the claimant of it" (see also pp. 180-181).

In an able opinion in a naturalization case reported as *Scott* v. *Strobach*, 49 Ala. 477, at 488, following *Spratt* v. *Spratt*, *supra*, the Court said:

> "*If the intendments and presumptions made by the law in favor of the regularity of judicial proceedings can be more liberally applied to one class of cases than to another, they should be to a judgment defining the status of an individual*, conferring rights and privileges and becoming an essential element of the title and succession of estates. *It would serve no good purpose, and would not comport with the spirit of the naturalization laws, to subject a certificate of naturalization to a technical or critical examination, when presented as evidence of citizenship.* If it is granted by a court having jurisdiction and by fair construction *imports a substantial compliance* with the requirements of the law, it must be deemed conclusive. *The errors of the court, or its clerk, must not be visited on the man who reposes on it as his title to citizenship.*"

Similarly, this Court, in *Tutun* v. *United States*, 270 U. S. 568, at 578, said:

> "The opportunity to become a citizen of the United States is said to be merely a privilege and

> not a right. * * * The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and if the requisite facts are established, to receive the certificate. * * * *In passing upon the application, the court exercises judicial judgment. It does not confer or withhold a favor.*"

(c) *This Court, in the instant case, in fact recognized the right to amend, but overlooked the fact that the matters contained in the certificate of arrival were already matters of public record.*

In the opinion rendered herein, the right to cure defective allegations is recognized in the passage reading:

> "*Very likely it (the District Court) had power to cure defective allegations*, but it had not *power to supply facts*."

The latter statement seems to overlook the fact that *all the statements required to be contained in the certificate of arrival are set forth in the petition, and were for many months previously of public record in the ship's manifests and in the dockets required to be kept* by Section 4 of this very Naturalization Act of 1906, as above pointed out.

(d) *The provision which required the filing of the certificate of arrival with the petition for naturalization is declaratory only, as shown by the legislative history of the act and the attendant circumstances, provided the certificate is produced before the decree of naturalization issues.*

Naturalization proceedings are *sui generis*, in that they are conducted almost invariably by the lay petitioners themselves, without the assistance of counsel. This is not merely due to the fact that applicants are commonly persons in very modest circumstances, frequently lacking the means to engage counsel, but in large measure because the statute and public policy encourage direct applications without the intervention of counsel, so as to enable the

Government officers the better to pass on applicants, and to judge of their qualifications. Consequently, the Naturalization Law is replete with detailed *declaratory* provisions, and contains forms rarely found in any other statute, to aid applicants. Surely Congress cannot have intended to make all these clauses mandatory, and to so hold will lead to retention of counsel in such cases commonly, and reverse the present policy. Moreover, there is much more likelihood in naturalization proceedings than in any other class of cases for the occurrence of inadvertent errors, because of mistakes made by busy clerks and examiners, unfamiliar with the actual facts of the particular case, who in a large percentage of cases fill the blanks in the forms supplied. *In other quasi-administrative proceedings, conducted without the aid of counsel, this Court has declined to apply rigid rules of law* (United States *ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, at 157).

In the debates in Congress in 1906 upon this very bill, this thought is exemplified. Thus, Congressman Hayes (a member of the subcommittee which drafted the bill in the House [59th Congress, 1st Session, House Repr. Document No. 1789], who was in part charge of it there, and whose statements on another point are cited by this Court in the *Voss* case, at p. 325, footnote, as authoritative on the legislative intent, under the rule applicable in *Duplex Co.* v. *Deering*, 254 U. S. 443, 475), answering Congressman Smith's objection that the bill contained highly technical and complicated provisions, declared that there was no necessity for applicants to employ counsel, and intimated that it would not be construed with technical rigidity (*Congressional Record*, Vol. 40, Part 7, p. 7044). He said:

> "My colleague objects to the technical character of the papers required by the bill. I believe he will admit that this objection falls to the ground when he understands that the Government is to furnish all the blanks for these proceedings, and all that remains is for the applicant or the clerk of the court, or any person, to fill in the names, dates, etc. *No legal knowledge is necessary to perform this small*

> *act.* I fail to see where any hardship is imposed on the alien desiring naturalization other than those imposed upon him by the present law, except in the matter of fees * * *."

Everything strengthens the view that the legislative intent was, therefore, that the proceedings were to be treated with the informality of administrative proceedings, rather than with insistence on the rigid technical accuracy of legal proceedings. Thus, in *United States* v. *Stoller*, 180 Fed. 910, at 912, holding that the statutory provision (Sec. 4, subd. 2) requiring a naturalization petition to be filed in duplicate is *directory* only, and not mandatory, the Court said:

> *"The second subdivision of this section does require that it be made and filed in duplicate;* but since the power was conferred upon the court, and a petition duly verified was filed, the *omission to file it in duplicate was nothing more than an irregularity.* It did not affect the jurisdiction. The court could and should, of course, have required a literal compliance with the statute, *but the view that its action upon the petition was void* for the reason that its power was not thus invoked, *does not comport with the analogies of the law in the construction of statutes.* For instance, a statute required the consent of the father to a marriage. It was held that a marriage without it was not void. So a statute which required that contracts 'shall be signed by the commissioner' did not render void a contract not thus signed. Again, when a court martial was to be appointed in June and was not appointed until July, *the statute was held to be directory.* These illustrations are taken from Sedgwick on Construction of Statutory and Constitutional Law (2nd Ed.), p. 318 et seq., where numerous other cases to the same effect are cited by the learned author. *My conclusion is that the provision requiring the petition to be filed in duplicate is directory;* that it might be corrected on appeal if this court could sit as one of revision, *but the failure to so file does not render nugatory the act of a court admitting an applicant without it."*

See also:

Spratt v. *Spratt*, 4 Peters 393, *supra*.
United States v. *Solomon*, 231 Fed. 461, at 463; aff'd 231 Fed. 928.

The leading case of *French* v. *Edwards*, 13 Wall. 506, 511, distinguishes between declaratory and mandatory provisions, and it was cited in the majority opinion below (Record, pp. 24-25) only because the Court failed to take note of the history and true significance of the clause "*and not otherwise*," and therefore placed the provision here involved in the mandatory category, on the theory that the provision was "accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated."

Moreover, the statute itself (Sec. 12) gives the clerk of the Court thirty days' time to forward the petition to the Bureau of Naturalization at Washington after filing, so that the Legislature clearly did not intend to make a belated filing of twenty days jurisdictional.

So also the Naturalization Rules, in their "Foreword," require the "Bureau of Naturalization," and its duly authorized representatives, (to) "assist the alien candidate for citizenship in the proper execution of his declaration and petition," a duty inadequately performed by the officials charged with that duty in the instant case.

In the light of his enormous experience in the most populous Federal district in the country, the words of Judge Learned Hand in *In re Denny*, 240 Fed. 845, when he permitted an amendment even of a declaration of intention, by correcting the name of the sovereign, allegiance to whom was renounced, are very much in point:

> "Unless there be some particular jurisdictional reason, every reasonable motive should allow the relief, which would be allowed at the present day in every other form of legal proceeding, *so far as I know. No one wants gratuitously to impose upon naturalization proceedings that technical spirit*

*which easily follows a literal application of so detailed a statute, and which results in vexations, disappointments and in needless irritation to a defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation. The decisions in question have, therefore, all depended upon the supposed jurisdictional nature of the requirement. * * * Obviously, unless the rule is that every statement is vital to the whole, the court must determine from their character, which statements Congress intended to be crucial, and this must depend upon the substantive significance of the statement itself."*

Though there is wide difference of opinion as to the precise point decided by Judge Hand, just referred to, his statement as to the importance of liberality in exercising the right to amend in general in naturalization cases has been repeatedly approved

Banning v. *Penrose*, 255 Fed., at 161
In re Pollock, 257 Fed., at 352
In re Maney, 13 F. (2nd), at 665

In the following cases provisions no less specific than those now under consideration have been held to be directory merely, and in most of them French v. *Edwards (supra) was cited:*

Western Electric Co. v. *North Electric Co.*, 135 Fed. 79 (C. C. A.) a patent case, Lurton, J., being one of the bench
United States v. *De Visser*, 10 Fed. 642, 648-649 (quoting *United States* v. *Kirkpatrick*, 9 Wheaton 720, Story, J.)
Lansburgh v. *McCormick*, 224 Fed. 874, 879 (C. C. A.)
Idaho Co. v. *Monk*, 218 Fed. 682, 684
Lancaster Co. v. *New York*, 214 N. Y. 112

In 36 *Cyc.* 1157-1160, it is well said:

> "Whether a particular statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. * * * A provision of course is mandatory, which is declared by the statute itself to be so. * * * Where the directions of a statute are given merely with a view to the proper, orderly and prompt conduct of business, the provision may generally be regarded as directory. * * * A statute specifying a time within which a public officer is to perform an act regarding the rights and duties of others is directory merely."

In *Fields* v. *United States*, 27 App. D. C. 433, 440, the Court of Appeals well said:

> *"Words like may, must, shall, and so forth, are constantly used in statutes, without intending that they shall be taken literally, and in the construction, the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed."*

(Certiorari was refused in 205 U. S. 292.)

SEVENTH.

The decision of this Court is likely to give rise to thousands of proceedings to cancel, involving purely technical variances from the statute, and to cause grave hardship after the lapse of many years after the rendition of decrees of naturalization and the accrual of vested rights in property and of status.

It is difficult to gauge the limits of this decision. In the Southern District of New York, for instance, no technical defect has been regarded as unamendable, other than an error in the so-called First Papers, stating the country of original allegiance, and it is safe to say that there is

scarcely a naturalization case in which some technical flaw may not be found. While the hardship to the petitioner in the present case may not be very great, it is incalculable in the cases of many thousands of persons whose naturalization is likely to be attacked at any time, however remote from the granting of the decree, for purely technical reasons. This would affect the wives and children of persons since deceased, whose citizenship is derivative, and would apply to cases in which evidence of requisite residence can no longer be established by the necessary witnesses found in the district. It is, in fact, almost impossible to specify all the circumstances of hardship which would result from the vacation of decrees of naturalization, though some of them are outlined in several of the cases cited above, and some of them were graphically portrayed at a recent meeting of the American Society of International Law (Proceedings of 1925, pp. 80 *et seq.*). It is also unfortunately true that in districts where a strong anti-alien feeling at times prevails, Government officials are prone to take most unwise and heartless action in the exercise of a supposed discretion in immigration and naturalization cases. Consequently, the decision rendered in this case, unless qualified or limited, will give rise to a multitude of oppressive proceedings to vacate naturalization. Furthermore, since the Government is represented by able and experienced representatives in the naturalization courts, and the applicant in comparatively few instances has the benefit of counsel, every comment or intimation contained in the opinions of this Court in naturalization cases is promptly seized upon by naturalization examiners to restrict unduly the rights of applicants for naturalization or of supposedly naturalized citizens.

EIGHTH.

In holding the certificate herein void because ninety days' posting can begin only from the time the Certificate of Arrival is filed, this Court overlooked the fact that no such question was raised by the Government's petition, nor by the Government's assignment of errors or briefs below, nor in the Naturalization Court, and hence petitioner's counsel failed to call attention to material statutes, rules, facts and decisions bearing on this subject.

On this branch of the case, the Court has, it is respectfully submitted, decided a question in no way open here. The only question raised by the Government's petition to cancel, under Section 15, was the failure to file the certificate, and not the slightest reference was made to posting (Record, p. 2). The petitioner raised the only issues Mrs. Maney was called upon to meet (*United States* v. *Salomon*, 231 Fed. 928, at 929 [C. C. A.]; *United States* v. *Rockteschell*, 208 Fed. 531 [C. C. A.]; *United States* v. *Knight*, 291 Fed. 129, 131, aff'd 299 Fed. 571). Mrs. Maney having prevailed in the District Court, the Government was bound under the statute to set forth alleged errors it relied on in its assignment of errors on appealing to the United States Circuit Court of Appeals, but no suggestion of inadequate posting was assigned as error (Record, pp. 18-19). Nor was any such question urged in the Government brief below (nor in its brief in this Court, except *arguendo* by way of suggestion), nor did the lower courts decide any such question, so such objection was waived (*Hull* v. *Burr*, 234 U. S. 712, 722).

In the District Court, in the original naturalization proceedings, the Naturalization Examiner specifically limited his objection to non-attaching of the certificate of arrival to the petition (Record, p. 7), and did not make the slightest reference to improper posting. Had he done so, *non constat* the Court would have complied with the rule ap-

plicable to such case, not heretofore called to the Court's attention, reading (Rule 1, subd. B, par. 5):

> "*The officers designated* in paragraph 4 hereof [naturalization examiners and their superiors], *before proceeding to the final hearing of any petition for naturalization, shall require proof of the posting of such petition in accordance with law, and in default of such proof shall move that the final hearing on such petition be continued pending the submission of such proof of posting.*"

Had the objection been taken, the Court doubtless might have required twenty days' additional posting. By not taking the objection, the Government waived the objection. This rule clearly indicates that the alleged defect was not regarded as jurisdictional.

Moreover, as already pointed out, the statute gives the clerk thirty days' time to send a copy of the petition to the Bureau at Washington after its filing (Sec. 12), so that the statute itself treats this matter as merely declaratory, at least where the delay is less than thirty days, and failure to ask a continuance shows that the twenty days' delay in filing the certificate was made up by greater expedition on the clerk's part. The whole posting provision was treated as declaratory merely in *United States* v. *Solomon*, 231 Fed. 461, at 463; aff'd 231 Fed. 928 (C. C. A.).

More important is the fact, above referred to, that the Court overlooked the circumstance *that the petition contains all the facts required to be stated in the certificate of arrival*, so that failure to file the certificate in time in no way interfered with posting the matters referred to in the posting section (Sec. 5), to wit, "name, nativity and residence of the alien, the date and place of his arrival in the United States, and the date as nearly as may be, for the final hearing of his petition and the names of the witnesses whom the applicant expects to summon in his behalf." It is further submitted, that legal posting ought not to be regarded as vitiated for failure to attach the certificate of arrival, if the latter may be legally filed *nunc*

pro tunc, under the analogies afforded by innumerable cases authorizing amendment of process in "substituted service" cases.

> 32 *Cyc.* 536-537.
> *King* v. *Davis*, 137 Fed. 198, aff'd 157 Fed. 676;
> *Arndt* v. *Griggs*, 134 U. S. 316.
> *Sage* v. *Central R. Co.*, 99 U. S. 334.
> *Nickerson* v. *Warren Co.* 223 Fed. 843.
> 1m. d *Eng. Anno. Cases*, 1915D, pp. 526-649.

NINTH.

Through inadvertence, petitioner's counsel failed to call the Court's attention to the fact that the legislative history of Section 15 of the Naturalization Act shows unmistakably that Congress intended to permit naturalization decrees to be vacated solely for want of jurisdiction or for fraud, and this Court's decision herein overlooked the limitations placed on Section 15 in *United States* v. *Ness*, 245 U. S. at 325-326, and in *Tutun* v. *United States*, 270 U. S. 568.

Congress realized that the words in Section 15 authorizing cancellation of naturalization certificates not merely for "fraud" but because "illegally procured" were indefinite and equivocal but it clearly used them in a very limited and restricted sense, and so as to be merely declaratory of existing law. This was clearly indicated by a colloquy between Congressman Fitzgerald and Congressman Bonynge (the latter having been chairman of the committee that drafted the bill, and having had chief charge of it in the House), as follows (*Congressional Record*, Vol. 40, Part 8, p. 7874):

> "Mr. Fitzgerald. The original section [in the bill as reported] provided that this proceeding might be brought for fraud or for illegality in the issuance of the certificate?
>
> Mr. Bonynge. Yes.

Mr. Fitzgerald: Are those clauses retained?
Mr. Bonynge: *They remain, and under existing law it can be done now, as decided by the federal courts.*"

The case of *United States* v. *Gleason*, 78 Fed. 396, aff'd 90 Fed. 778 (Lacombe, J., writing, Wallace, J., dissenting), was almost *sui generis*, in denying relief, prior to the Act of 1906, to cancel a decree of naturalization by suit in equity for fraud, the great weight of authority having been in favor of the right to do so where fraud was involved, or where there was an actual want of jurisdiction (*United States* v. *Nordsch*, 42 Fed. 417; *United States* v. *Kornmehl*, 89 Fed. 10; *Pinsch Co.* v. *Bergin*, 84 Fed. 140; *Scott* v. *Strobach*, 49 Ala. 477, 488; *People* v. *McGowan*, 77 Ill. 644; *McCurren* v. *Cooper*, 16 N. Y. App. Div. 311, approving *United States* v. *Nordsch*, *supra*, and affirmed on opinion below, 162 N. Y. 654; *State ex rel. Lacy* v. *Brandhorst*, 156 Mo. 457; *Tinns* v. *United States District Attorney*, 148 Cal. 793; *Andre* v. *Arnold*, 77 Mich. 85; *Mills* v. *McCafe*, 44 Ill. 194; *Behrensmeyer* v. *Kratz*, 135 Ill. 591, 630; *State ex rel. Bancroft* v. *Stumpf*, 23 Wis. 630; *Spratt* v. *Spratt*, *supra*; 2 *Corpus Juris*, 1124-1125). Even the facts involved in *United States* v. *Ginsberg*, *supra*, action by a court elsewhere than in open court, was previously held to be action without jurisdiction in *Behrensmeyer* v. *Kratz*, *supra*. The cases, however, sharply distinguished between actual want of jurisdiction and fraud on the one hand, and mere irregularity on the other, according relief in the former class of cases, and denying it in the latter. This Court, in *Johannesen* v. *United States*, 225 U. S. 227, at 236, 240, held that the decisions antedating the Act of 1906 merely forbade *collateral* attack of a decree of naturalization, and recognized that even the decision in the case of *United States* v. *Gleason*, *supra*, may be thus sustained, because the attack there was collateral, in that a State court decree was assailed in a Federal court. The Act of 1906 in Section 15 being thus merely declaratory of subsisting law, except in as far as it conferred jurisdiction on the Federal courts to hear such suits, the words

"illegally procured" ought to be limited, in accordance with the legislative intention, to actual want of jurisdiction, and not merely for irregularity.

In the report of the committee which accompanied the bill in the House (59th Congress, 1st Session, House Report No. 1789, p. 7), it is said of the cancellation section that it simply "prescribes proceedings for cancellation of *fraudulent* certificates of naturalization."

The limited and narrow jurisdiction conferred by Section 15, as distinguished from an appeal, was clearly expressed by this Court in *United States* v. *Ness*, 245 U. S. 319, at pages 325 326, where it was said:

> *"The remedy afforded by Sec. 15 • • • is narrower in scope than the protection offered under Sec. 11. Opposition to the granting of a petition for naturalization may prevail, because of objections to the competency or weight of evidence or the credibility of witnesses or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive as against the United States, if it entered an appearance under Sec. 11."*

Again, in *Tutun* v. *United States*, 270 U. S. 568, at 579, it was said by this Court:

> *"The remedy afforded to the government by Sec. 15 is narrower in scope than the review commonly afforded by appellate courts."*

See also *Spratt* v. *Spratt*, 4 Peters 393, *supra*.

These passages were overlooked by the Court in the instant case, which affords a practically unlimited remedy to vacate certificates of naturalization "illegally procured," where mere irregularity is involved.

The passages from the two cases cited have repeatedly been applied by United States Circuit Courts of Appeals since then, and in almost countless *nisi prius* decisions.

> *United States* v. *Milder*, 284 Fed. 571, at 572 (C. C. A., 8th Cir.).
>
> *United States* v. *Tiem*, 299 Fed. 582, 583 (C. C. A., 9th Cir.).

United States v. *Richmond*, 17 Fed. (2nd) 28, at 29, 32 (C. C. A., 3rd Cir.).

United States v. *Sakharam Ganesh Pandit*, 15 Fed. (2nd) 285 (C. C. A., 9th Cir.); certiorari refused, 273 U. S. 759.

United States v. *Srednik*, 19 Fed. (2nd) 71 (C. C. A., 3rd Cir.).

United States v. *Orens*, 13 Fed. (2nd) 376 (C. C. A., 4th Cir.).

United States v. *Javier*, 22 Fed. (2nd) 879, 880 (App. D. C.).

United States v. *Gokhale*, 26 Fed. (2nd) 360, 361 C. C. A., 2nd Cir.) (certiorari granted).

TENTH.

Wherefore, your petitioner prays that a rehearing be directed, or, if the same be not granted, that the opinion of the Court be limited by a supplemental opinion (cf. *Arndstein* v. *McCarthy*, 254 U. S. 379), and that your petitioner have such other and further relief as may be proper.

And your petitioner will ever pray, etc.

ANNA MARIE MANEY,
by BRUNO V. BITKER,
Her Attorney.

LOUIS MARSHALL,
MAX J. KOHLER,
BRUNO V. BITKER,
of Counsel.

I HEREBY CERTIFY that I have examined the foregoing petition; that in my opinion it is well founded, and that it is presented in good faith and not for delay.

Dated November 12, 1928.

LOUIS MARSHALL,
of Counsel for Petitioner.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1928.

Anna Marie Maney, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[October 22, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner obtained a certificate of naturalization by a decree of a District Court of the United States in February, 1924. In June, 1925, the United States filed a petition to have the certificate cancelled on the ground that it was illegally procured. The District Court dismissed the Government's suit, 13 F. (2d) 662. But this decision was reversed by the Circuit Court of Appeals and an order cancelling the certificate of naturalization was directed. 21 F. (2d) 28. A writ of certiorari was granted by this Court on the 9th of January last.

The petition for naturalization was filed on November 13, 1923, but at that time there was not filed the certificate from the Department of Labor stating the date, place, and manner of arrival in the United States, and the declaration of intention of such petitioner, which the Naturalization Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Code, Title 8, § 380), required to be attached to and made

part of the petition. It is said that the Department of Labor did not issue the certificate until November 24, 1923, and it was not mailed to the clerk of the Naturalization Court until December 3. The hearing on naturalization took place on February 11, 1924, and the District Court, against the objection of the United States, ordered the certificate filed and attached to the petition *nunc pro tunc* as of the date when the petition was filed, and made the decree purporting to admit the petitioner to citizenship that has been annulled in the present proceeding. The petitioner says that the original decree made the question *res judicata*, and that it was right, or at least within the power of the Court.

By § 15 of the Naturalization Act, (C., § 405,) it is made the duty of district attorneys upon affidavit showing good cause therefor to institute proceedings for cancellation "on the ground that the certificate of citizenship was illegally procured." The first question is whether the certificate was illegally procured within the meaning of § 15. If the statute makes it a condition precedent to the authority of the Court to grant a petition for naturalization that the Department of Labor's certificate of arrival shall be filed at the same time, then, when it appears on the face of the record that no such certificate has been filed, a decree admitting to citizenship is bad. It is illegal in the sense that it is unauthorized by and contrary to the law. *United States* v. *Ginsberg*, 243 U. S. 472, 475. *United States* v. *Voss*, 245 U. S. 319, 324, 325.

We are of opinion that the Circuit Court of Appeals was right in holding that the filing with the petition of the certificate of arrival was a condition attached to the power of the Court. Although the proceedings for admission are judicial, *Tutun* v. *United States*, 270 U. S. 568, they are not for the usual purpose of vindicating an existing right but for the purpose of getting granted to an alien rights that do not yet exist. Hence not only the conditions attached to the grant, but those attached to the power of the instrument used by the United States to make the grant must be complied with strictly, as in other instances of Government gift. By § 4 of the Act an

alien may be admitted to become a citizen of the United States in the manner prescribed, "and not otherwise." And by the same section the certificate from the Department of Labor is to be filed "at the time of filing the petition." (C., §§ 372, 379.) The form provided by § 27 (C., § 409) alleges that the certificate is attached to and made a part of the petition. The Regulations of the Secretary of Labor embodied our interpretation of the law, and would have warned the petitioner if she had consulted them. Rule 5, Ed. February 15, 1917; Ed. September 24, 1920. *United States* v. *Ness*, 245 U. S. 319, 323. It already has been decided that the filing of the certificate is an essential prerequisite to a valid order of naturalization, *United States* v. *Ness*, *sup.*, and that a hearing in chambers adjoining the courtroom does not satisfy the requirement of a hearing in open Court. *United States* v. *Ginsberg*, 243 U. S. 472. The reasoning that prevailed in those cases must govern this. A hearing in less than ninety days from the public notice required by § 6 (Code, § 396) surely would have been as bad as a hearing in chambers. But as it has been decided that no valid decree could be made until the certificate was filed and as the hearing took place and the decree was entered in less than ninety days from the time when the certificate was received the want of power seems to us doubly plain. If after the certificate came the petition had been refiled, a new notice had been given and ninety days had been allowed to elapse before the hearing there would be a different case.

It is said that the District Court had control of procedural matters and could cure formal defects. Very likely it had power to cure defective allegations but it had not power to supply facts. If, as we decide, the petitioner was required to file the Department of Labor's certificate at the same time that she filed her petition, the District Court could not cure her failure to do so and enlarge its own powers by embodying in an order a fiction that the certificate was filed in time.

As the certificate of citizenship was illegally obtained, the express words of § 15 authorize this proceeding to have it cancelled. The judgment attacked did not make the

matter *res judicata*, as against the statutory provision for review. The difference between this and ordinary cases already has been pointed and would be enough to warrant a special treatment. But it hardly can be called special treatment to say that a record that discloses on its face that the judgment transcends the power of the judge may be declared void in the interest of the sovereign who gave to the judge whatever power he had.

Judgment affirmed.